90-160

No.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1989

CHARLES MICHAEL SMITH - - - Petitioner

versus

COMMONWEALTH OF KENTUCKY - - - - - - Respondent

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES

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QUESTIONS PRESENTED FOR REVIEW

Whether the exclusion of a witness's medical records which contained information concerning her mental problems and which reflected upon her credibility and truthfulness denied the Petitioner his right to adequate confrontation of his accusers under the Sixth Amendment and his right to due process of the law under the Fifth Amendment pursuant to the Fourteenth Amendment which makes it applicable to the States.

Whether the Kentucky Supreme Court improperly applied the *Souder* test in admitting a witness's statements as "excited utterance" exceptions to the hearsay rule so as to have denied the Petitioner his rights to due process of the law under the Fifth and Fourteenth Amendments, to equal protection of the laws under the Fourteenth Amendment, and to confrontation of his accusers under the Sixth Amendment.

Whether a jury instruction and conviction for wanton murder are justified and constitutional when the prosecution has failed to present evidence in support of the offense and in fact has not proven the material elements of the offense of wanton murder beyond a reasonable doubt as required by the due process of law clause of the Fifth and Fourteenth Amendments.

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CHARLES MICHAEL SMITH - - - - *Petitioner*

v.

COMMONWEALTH OF KENTUCKY - - - *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES

Petitioner, CHARLES MICHAEL SMITH, respectfully prays that a Writ of Certiorari issue to review the opinion of the Supreme Court of Kentucky entered on March 15, 1990.

OPINION BELOW

The opinion of the Supreme Court of Kentucky was rendered on March 15, 1990. To be published. Petition for Rehearing was denied May 24, 1990.

JURISDICTION

The opinion of the Supreme Court of Kentucky was entered on March 15, 1990. Petition for Rehearing was denied on May 24, 1990. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1257.

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution, which states in pertinent part:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, . . . ; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law.

The Fourteenth Amendment to the United States Constitution states:

> No State shall make or enforce any law which abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The Sixth Amendment to the United States Constitution, which states in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right to be confronted with the witnesses against him.

STATEMENT OF THE CASE

On September 22, 1987, in the early hours of the morning, between 2:20 and 2:40 a.m. (October 25, 1988; 15:39:00 et seq. and October 26, 1988; 10:49:40), a person broke through the door of Margaret Cecil's apartment at 307 Huntington Park Drive, and armed with a 410 shotgun, shot and killed Ms. Cecil's boyfriend, Michael Foley. The Petitioner, Charles Michael Smith, a former boyfriend of

Ms. Cecil, arrived at the Warehouse Pub on Wathen Lane between 2:10 and 2:20 a.m. (October 26, 1988; 10:43:00 and October 27, 1988; 13:31:40 et seq.) Mr. Smith asked to use the phone, and the bartender, who is Margaret Cecil's sister, Dorothy Slater, refused to let him use the phone. (October 25, 1988; 15:39:00) The Petitioner then left the Warehouse Pub at 2:20-2:30 a.m. according to Ms. Slater, or at 2:35-2:40 a.m. according to Mary Denise Gnau, a witness at the pub. (October 26, 1988; 10:49:40) As the Petitioner was leaving, Dorothy Slater called Margaret Cecil at her apartment to tell her that she thought Mr. Smith was coming to Ms. Cecil's apartment. (October 25, 1988; 15:40:04)

At 2:41 a.m. Margaret Cecil called the Jefferson County Police and reported a shooting at her apartment (TR, p. 40). Dispatcher Elmore with the Jefferson County Police asked Ms. Cecil who was shot. After a short pause, Ms. Cecil responded that Michael Foley had been shot (TR, p. 40). The Dispatcher then asked who did the shooting. The response, after a pause, was Charles Michael Smith (TR, p. 40). Dispatcher Elmore called Ms. Cecil back "to get further information." (October 25, 1988; 15:32:26) On this occasion, in response to the Dispatcher's questioning, Ms. Cecil again stated that Charles Michael Smith committed the offense (TR, p. 41).

Upon investigation of the scene, the Jefferson County Police found a spent 410 shotgun shell inside the bedroom door of Ms. Cecil's apartment. (October 15, 1988; 14:24:01) Apart from this shell, the police found no other physical evidence in the apartment, in Mr. Smith's truck, in his house, or on Mr. Smith's person. The weapon used in the shooting was never found.

The Jefferson County Police put out a call on the Appellant, and at approximately 3:00 a.m., Officer Patterson of the Louisville Police Department reported Mr. Smith's truck outside the house at 1017 East Burnett. When the petitioner came to the door in response to Officer Patterson's knock, he was dressed in his underwear and, as the officer testified at trial, appeared to have been asleep. (October 26, 1988; 10:08:15) Detective Mobley with the Jefferson County Police testified that while in the area of Mr. Smith's house, Joseph Smith, the Petitioner's father, told him that Mr. Smith Sr. owned a 410 gauge shotgun but had no idea where it was. (October 26, 1988; 09:56:20) At trial, Joseph Smith denied ever saying that he owned a 410 gauge shotgun. (October 25, 1988; 10:50:16)

On December 29, 1987, the Petitioner and Ms. Cecil were married in Tennessee. In January of 1988, Margaret Cecil Smith and her sister, Janie Benton, while on the way back from vacation in Florida, met the Petitioner in Elizabethtown, Kentucky, and the three of them returned to Nashville, Tennessee. Mrs. Benton testified that on this occasion, Mr. Smith confided in her and margaret Cecil Smith that he had in fact shot Michael Foley with a "rifle." (October 25, 1988; 10:27:35)

On March 30, 1988, the Honorable Judge Earl O'Bannon, Jr. granted a motion to allow Margaret Cecil Smith to assert her spousal immunity privilege (TR, p. 35). However, Judge O'Bannon did admit the statements of Mrs. Smith to the Jefferson County Police Dispatcher and to Dorothy Slater as "excited utterance" exceptions to the hearsay rule (TR, p. 96). Judge O'Bannon admitted these statements on rationale that the factors articulated in *Souder* v. *Commonwealth*, Ky., 719 S.W. 2d 730, 733 (1986), were substantially met (TR, p. 95). In addition, the trial

court held that the medical records of Mrs. Benton were not relevant and therefore excluded the evidence. The trial lasted three days, from October 25 to October 27, 1988. After deliberations, the jury found the Petitioner guilty under Instruction I(b), Wanton Murder (TR, p. 115), and Instruction IV, Burglary in the First Degree (TR, p. 118), and set punishment at thirty-five years confinement, the counts to run concurrently (TR, pp. 122-123).

Petitioner timely filed a Motion for New Trial (TR, p. 128), and the trial judge overruled the motion and pronounced formal sentence in accordance with the jury's recommendation. Petitioner then appealed to the Supreme Court of Kentucky, and the court affirmed the Petitioner's conviction. In affirming, the Court held that the statements made by Ms. Cecil qualified as "excited utterances" under the *Souder* test, and therefore were admissible as an exception to the hearsay rule. The Supreme Court of Kentucky also held that the medical records of Mrs. Benton were in fact relevant to the case and should have been admitted on that ground but were properly excluded by the trial court because of the notice defect. The Court stated:

> We agree that the records were relevant, and therefore competent for admission in that respect. However, KRS 422.305 required defense counsel to give proper notice to the prosecution. This was not done, therefore, the trial court made the right ruling, albeit for the wrong reason.

Lastly, the Court held that the wanton murder instruction was proper based solely upon the testimony of Ms. Benton that the Petitioner said "he did not mean to shoot the victim."

REASONS FOR GRANTING THE WRIT

This Writ should be granted on the grounds that the Petitioner was deprived of his right to confrontation under the Sixth Amendment and his right to due process under the Fifth and Fourteenth Amendments when he was denied the opportunity to adequately impeach the testimony of Mrs. Benton with medical records which revealed medical problems denied by the witness and which reflected upon her trustfulness and credibility.

The Kentucky Supreme Court correctly held that the medical records of Ms. Janie Benton were relevant, and therefore admissible to impeach Ms. Benton's testimony. However, the court erroneously affirmed the trial court's decision to exclude the medical records on the grounds that Petitioner's counsel failed to properly notify the prosecution. The Petitioner's counsel did in fact notify the prosecution of the records at the earliest possible moment, which was the time counsel himself was notified, albeit the day of the trial. Even assuming arguendo that the notice was defective, the trial court excluded such evidence on the basis of relevance and not defect of notice, and Petitioner's counsel did have adequate time to cure the defect, if any, during trial.

The Supreme Court of Kentucky held that the records were relevant and should have been admitted but for the notice defect. The prosecution raised the issue of notice pursuant to a state statute permitting the medical records to be admitted without the custodian of the records appearing. The notice requirement could have been easily cured because the medical records custodian was under Defense's subpoena, and the Defense could have easily called the records custodian, and in fact offered to do just that, at the trial. Therefore, relevance was the issue, and the trial court erred in excluding such evidence.

The defendant's general Fourteenth Amendment right to due process imposes some limits on the state's power to exclude evidence in criminal cases. *Perry* v. *Rushen,* 713 F. 2d 1447, 1450 (9th Cir. 1983). The Petitioner's general Fourteenth Amendment right to due process also restrains operation of state rules of evidence. *Id.* Due process "is, in essence, the right to a fair opportunity to defend against the State's accusations." *Chambers* v. *Mississippi,* 410 U.S. 284, 294 (1973). More importantly, the court in *Chambers* stated that the evidentiary rules "may not be applied mechanistically to defeat the ends of justice." *Id.* at 302. Such is the consideration in this case.

The court in *Perry,* stated that the "defendant must show that his interest clearly outweighs the state's" before it would interfere with routine procedural matters. In this case, the state interest in enforcing a notice requirement which would exclude relevant and probative evidence obviously does not outweigh the Petitioner's Constitutional right to due process and to adequately confront his accusers. The Petitioner's interest in this case is strong because his conviction for wanton murder was strongly based on Ms. Benton's testimony that the Petitioner "simply lost control of himself and shot."

Mrs. Benton's testimony was that the Petitioner admitted to shooting the victim, Michael Foley, but the Petitioner denied any such admission to her. Thus, the credibility of Mrs. Benton was a key issue. The medical records were important and relevant for several reasons. First, the shooting took place a short distance from Mrs. Benton's residence, and the records refer to Mrs. Benton's desire to violently cause the death of another. Second, Mrs. Benton denied the references made in the records and also denied several other facts contained in her records. Thus,

the records and her denials of its contents reflect upon her veracity and the truthfulness of her testimony.

The medical records of Janie Benton were critical to the Petitioner's ability to adequately cross-examine the witness, and the exclusion of such records from evidence constituted a violation of the Petitioner's right to adequately confront his accusers. The adequate impeachment of Ms. Benton's testimony was of particular importance in this case because the "wanton murder" instruction and conviction were entirely based on her statements and without physical evidence. In almost every setting where important decisions turn on questions of fact, due process requires the opportunity to confront and cross-examine adverse witnesses. *Goldberg* v. *Kelly,* 397 U.S. 254 (1970). The medical records should have been admitted to allow the Petitioner to adequately attack the credibility by showing the mental instability of the witness and to show that she was not testifying truthfully. The jury should have been given the opportunity to weigh the testimony of Ms. Benton with the evidence.

In the case at bar, although the witness, Janie Benton, was cross-examined by the Petitioner's counsel, the Petitioner contends that the spirit of the confrontation clause of the Sixth Amendment requires not only procedural confrontation, but more importantly, adequate confrontation untainted by the exclusion of relevant and probative evidence. It is important to keep in mind that this is a criminal case, and the confrontation clause of the Sixth Amendment was specifically designed to protect the principle that in a criminal case one is innocent until proven guilty, and at the very minimum, the courts should give the accused every legitimate opportunity to adequately confront his accusers.

In addition, this writ should be granted because the Kentucky Supreme Court improperly applied the *Souder* test in upholding the admission of Margaret Cecil's statements as an "excited utterance" exception to the hearsay rule of evidence. In so doing, the Court violated the petitioner's rights under the Due Process clause of the Fifth Amendment, the Equal Protection Clause of the Fourteenth Amendment, and the Sixth Amendment to the United States Constitution.

The Supreme Court of Kentucky upheld the determination by the trial court that the statements made by Margaret Cecil Smith constituted an "excited utterance" exception to the hearsay rule of evidence. Fed. R. Evid. 803(2). The Supreme Court correctly stated that the Petitioner's contention was that the statements made by Ms. Smith were inadmissible because they failed to meet the criteria set forth in *Souder* v. *Commonwealth*, Ky., 719 S.W. 2d 730 (1986). The Petitioner contends that since Ms. Smith's statments failed to meet the key criteria enunciated in *Souder*, admission of such statements as an "excited utterance" by the trial court was erroneous and violated the Petitioner's rights under the Due Process Clause, under the Equal Protection clause of the Fourteenth Amendment, and under the Sixth Amendment. *Id.*

The Due Process Clause of the Fifth Amendment pursuant to the Fourteenth Amendment which makes it applicable to the States guarantees that "no person shall be deprived of life, liberty or property without due process of law." In this case, the Petitioner's rights under this clause have been violated; he has been convicted without physical evidence against him byt primarily by the hearsay statements of Ms. Smith which were admitted as "excited utterances" under a test that the Kentucky Supreme Court arbitrarily applied. In addition, the statements of Ms.

Smith did not contain the guarantee of trustworthiness required of statements which fall into an exception to the hearsay rule, and therefore, absolute admission of these statements without any safeguards to the Petitioner's rights to confront them was not due process of law, and this court should reverse the decision in order to safeguard the fundamental rights afforded the Petitioner by the Fifth and Fourteenth Amendments.

In adopting the *Souder* test as the general guideline for admissibility of an "excited utterance" and then applying it differently in each case, the Court violated the Petitioner's right to equal protection of the laws. *Id.* Applications of the law by the States must not be arbitrary and capricious so that each person may rely on the laws and not worry that it wil be interpreted differently to his or her case.

The *Souder* test sets forth eight factors which determine whether a statement is "spontaneous" or "excited" and therefore an exception to the hearsay rule:

(i) Lapse of time between the main act and the declaration,

(ii) The opportunity or likelihood of fabrication,

(iii) The inducement to fabrication,

(iv) The actual excitement of the declarant,

(v) The place of the declaration,

(vi) The presence there of visible results of the act or occurrence to which the utterance relates,

(vii) Whether the utterance was in response to a question, and

(viii) Whether the declaration was against interest or or self-serving.

The Supreme Court of Kentucky incorrectly applied the test to the case at bar because several of the key factors of the test were not met by Ms. Smith's statements. The Supreme Court of Kenutcky emphasized the time factor and commented on several of the other factors of the *Souder* test in its opinion. However, it failed to articulate the reasoning behind its interpretation of the test, and more specifically, failed to discuss which of the factors it felt should be weighed more heavily in applying the test to each individual case. If such a test is to be the law of the State, then is must be applied equally in each case. By weighing some factors more heavily in one case and not in another creates two distinct groups of persons—one which is protected by the test and another which is not—and deprives the accused of equal protection of the laws.

Two factors are important in determining whether the admission of hearsay statements violates the confrontation clause of the Sixth Amendment. First, the general rule is that when a hearsay declarant is not present for cross examination, the confrontation clause requires a showing of unavailability, though not always. *Dutton* v. *Evans,* 400 U.S. 74 (1970). Second, to be admissible, a statement must contain sufficient indicia of reliability to ensure accuracy in the fact finding process. *Ohio* v. *Roberts,* 448 U.S. 56, 65 (1980).

Since the declarant in this case, Ms. Smith, exercised her right not to appear in court under the privilege of spousal immunity, she was for all practical purposes "unavailable." Therefore, the first prong of the analysis would tend toward admission of her statements into evidence. However, the statements made by Ms. Smith clearly do not satisfy the second prong of the analysis. Ms. Smith's later statements to Petitioner's counsel indicated that her

statements which were admitted as "excited utterances" did not have a sufficient indicia of reliability. Ms. Smith stated to Appellant's counsel that she did not actually see the individual who shot Michael Foley, but rather, based her statements on assumptions from information she had received from her sister. A few minutes before the shooting occurred, Ms. Cecil's sister had called her from the Warehouse Pub as the Petitioner was leaving it, and she told her that she thought that the Petitioner was on his way to Ms. Cecil's apartment. Therefore, she did have the time to reflect upon her answer to the police dispatcher and was practically given the answer by her sister. In fact, Ms. Cecil had been anticipating the arrival of the Petitioner in her mind after her sister's call.

In this case, the trial court improperly admitted Ms. Smith's statements because they did not contain an element of reliability sufficient to overcome the requirements of the confrontation clause. In the alternative, even if the original statements were correctly classified as an "excited utterance" exception to the hearsay rule, the trial court should have also admitted Ms. Smith's subsequent statements to Petitioner's counsel which contradicted and explained the reasoning behind her initial statements. Assuming that the initial statements were admissible as "excited utterances," the subsequent statements should have been admitted as pertaining to the weight to be given the initial statements. Even if this court finds that the statements were admissible, Ms. Smith's exercise of spousal immunity, contrary to the wishes of the Petitioner, coupled with the "excited utterance" exception to the hearsay rule left the petitioner without means to counter and impeach such statements. This clearly deprived the Petitioner of his right to confrontation under the Sixth Amendment, and justice demands that

the Petitioner be given the opportunity to present testimony which would allow the jury to weigh the evidence accordingly.

Although the confrontation clause is not coterminous with the common law hearsay rule, they both "stem from the same roots" and are "designed to protect similar values." *Id.* at 66. Therefore, in order for a statement to fall within a firmly rooted hearsay exception means that it contains sufficient reliability to satisfy the requirements of the confrontation clause. *Haggins v. Warden, Fort Pillow State Farm*, 715 F. 2d 1050, 1056 (6th Cir. 1983). Especially in criminal cases, courts should interpret the evidentiary rules liberally in order to protect the accused's liberty when a conviction which takes away that liberty is based primarly on an unreliable witness identification. Such is the spirit behind due process and the requirement of burden beyond a reasonable doubt in criminal cases.

Finally, this writ should be granted in that the trial court's instructions to the jury on Wanton Murder was inappropriate and denied the Petitioner his right to Due Process of the law under the Fifth Amendment pursuant to the Fourteenth Amendment.

It is axiomatic that a conviction upon a charge not made or upon a charge not tried constitutes a denial of due process. *Cole v. Arkansas*, 333 U.S. 196, 201 (1948). In the case at bar, the trial court's instruction to the jury on wanton murder and the conviction of the Petitioner on that offense were erroneous because they were not supported by the prosecution's case. *In re Winship* held for the first time that the Due Process clause of the Fourteenth Amendment protects a defendant in a criminal case against conviction "except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which

he is charged." 397 U.S. 358, 364 (1970). Thus, the standard secures to the accused the most elemental of due process rights: the freedom from a wholly arbitrary deprivation of liberty. *Thompson* v. *Louisville,* 362 U.S. 199, 206 (1960).

No evidence was presented at trial concerning wanton conduct and indeed, the Commonwealth argued throughout the trial and in closing argument that the shooting took place at such close range that it had to have been an intentional act. It is the duty of the prosecution in a criminal case to prove every material element of an offense, including the requisite mental state, and a failure to do so should exclude any instruction to the jury as to that offense. A meaningful opportunity to defend, if not the right to a trial itself, presumes in addition that a conviction based upon a record wholly devoid of any relevant evidence of a crucial element of the offense charged is constitutionally infirm. *Jackson* v. *Virginia,* 443 U.S. 307, 313 (1979).

In *U.S.* v. *Scafe,* the court held that a defendant was not entitled to an instruction which lacked a reasonable legal and factual basis. 822 F. 2d 928, 932 (10th Cir. 1987). Petitioner contends that such reasoning also applies to the prosecution and, in this case, the prosecution should not have been entitled to an instruction on wanton murder when the prosecution failed to show a "legal and factual basis" for it. The prosecution and the trial court relied upon the testimony of a witness whose excluded medical records established mental instability in permitting the wanton murder instruction.

Assuming that this testimony was correctly admitted into evidence, the testimony alone was insufficient to establish that the requisite mens rea existed. There must be some other corroborating evidence or testimony before the

testimony of an unreliable witness can be used to allow an instruction on a lesser included offense which otherwise could not be given. *Hayes* v. *Commonwealth*, Ky., 625 S.W. 2d 583, 584 (1981). Even if the testimony of Ms. Benton constituted "some evidence," this court must consider whether any rational trier of fact could have found the essential elements of the crime *beyond a reasonable doubt*. *Johnson* v. *Louisiana*, 406 U.S. 356, 362 (1971).

Petitioner contends that the prosecution did not prove beyond a reasonable doubt the mens rea of "wanton" essential to the offense, and in fact, relied only on the testimony of a mentally instable witness to procure such an instruction. Even if the testimony of Mrs. Benton is taken in the light most favorable to the prosecution, it still does not justify a wanton murder instruction. The evidence taken out of Mrs. Benton's testimony was that the defendant did not go to the apartment to harm anyone but that when he saw the victim, he got so angy that he lost control of himself and shot Michael Foley. The prosecution presented no evidence that the shooting was anything but an intentional act. Indeed, the prosecution argued throughout the trial that the shooting was an intentional one. The issue in this case was whether the Petitioner was the person who committed the shooting, and not whether the shooting was an intentional act.

The Due Process clause of the Fourteenth Amendment must be held to safeguard against dilution of the principle that guilt is to be established by probative evidence and beyond a reasonable doubt." *Taylor* v. *Kentucky*, 436 U.S. 487, 486 (1978). Thus, the instruction to the jury on wanton murder was erroneous, and the conviction based on the instruction was a violation of the Petitioner's funda-

mental right to due process of law under the Fifth and Fourteenth Amendments.

CONCLUSION

Petitioner's case presents an opportunity for this Court to set a more definite standard in regard to what statements constitute an "excited utterance" exception to the hearsay rule. In addition, because the Kentucky Supreme Court erroneously excluded highly relevant and probative evidence against the interest of the Petitioner, this Writ of Certiorari should be granted in order to secure the Petitioner's rights of Due Process of the law under the Fifth and Fourteenth Amendments and of Confrontation of his accusers under the Sixth Amendment. Further, in order to comply with the principle of Due Process of the law, this Court should affirm the standard of proof and evidence articulated in *In Re Winship* necessary to sustain a criminal conviction. This Writ of Certiorari should be issued to review the opinion of the Supreme Court of Kentucky which is in conflict with the rights guaranteed by the Fifth, Sixth, and Fourteenth Amendments of the United States Constitution.

Respectfully Submitted,

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Counsel for Petitioner

CERTIFICATE OF SERVICE

I, G. Murray Turner, Counsel for Petitioner, certify that the attached Petition for Writ of Certiorari, Appendix, and Notice of Appearance was mailed to the Office of the Clerk of the United States Supreme Court, Washington, D.C. 20543, and the Counsel for Respondent, Mr. Frederic J. Cowan, Attorney General, Commonwealth of Kentucky, Office of the Attorney General, State Capitol Building, Frankfort, Kentucky 40601, this 20 day of July, 1990, by personally depositing the same in the United States Mail, first class postage prepaid.

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Counsel for Petitioner

State of Kentucky }
County of Jefferson }

Subscribed, sworn to and acknowledged before me, a Notary Public, this 20th day of July, 1990 by G. Murray Turner.

My commission expires: 10/30/90

Notary Public, State at Large, Ky.

NOTICE OF APPEARANCE

The Clerk will enter my appearance as Counsel for Petitioner. I certify that I am a member of the Bar of the United States Supreme Court. The Clerk is requested to notify the undersigned of action by the Court by regular mail.

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APPENDIX

APPENDIX A

RENDERED: MARCH 15, 1990
TO BE PUBLISHED

SUPREME COURT OF KENTUCKY

89-SC-044-MR

CHARLES MICHAEL SMITH - - - - - *Appellant*

v.

COMMONWEALTH OF KENTUCKY - - - *Appellee*

Appeal From Jefferson Circuit Court
Honorable Earl O'Bannon, Jr., Judge
No. 87-CR-1452

OPINION OF THE COURT BY JUSTICE COMBS AFFIRMING

Appellant was convicted in the Jefferson Circuit Court of wanton murder and first-degree burglary, and sentenced to thirty-five years in prison.

In seeking a reversal he assigns several errors. A brief summary of the evidence is necessary in order to treat and dispose of his various contentions.

Someone broke into Margaret Cecil's apartment on the morning of September 22, 1987, armed with a .410 gauge shotgun. The intruder shot and killed Cecil's boyfriend, Michael Foley.

Appellant, Cecil's former boyfriend, arrived at a bar between 2:10 a.m. and 2:20 a.m. and asked to use the telephone. The bartender, Dorothy Slater, Cecil's sister, refused to allow him to do so. Appellant left the bar

sometime between 2:20 a.m. and 2:40 a.m. Slater called Cecil to alert her that she believed appellant was enroute to Cecil's apartment.

Cecil called the police at 2:41 a.m. and reported a shooting at her apartment. The dispatcher asked who had been shot, and Cecil said Michael Foley. The dispatcher then asked who had shot Foley, and Cecil named the appellant. The dispatcher called Cecil a second time to get further information. Again, in response to the question of who had shot Foley, Cecil named appellant.

The police investigation at the scene found a spent .410 gauge shotgun hull inside Cecil's bedroom door. No other physical evidence was found on the appellant's person, in his truck, or his house.

The police went to appellant's house at 3:00 a.m. Appellant answered the knock and appeared to the officer to have been asleep. A detective testified that while in the area of appellant's house he questioned appellant's father. According to the detective, the father stated that he owned a .410 gauge shotgun, but that he had no idea where it was. At trial, the father denied making this statement.

Three months later, appellant and Margaret Cecil were married in Tennessee. The next month Margaret Cecil Smith and her sister, Janie Benton, went to Florida and Tennessee, and upon returning to Elizabethtown, Kentucky, met appellant. The three returned to Nashville, Tennessee. Benton testified at trial that during this trip the appellant confided to both women that he had shot Michael Foley with a "rifle."

Appellant argues that the trial court erred when it allowed Margaret Cecil Smith to assert her privilege of spousal immunity, but allowed into evidence the statements she made to the police dispatcher which named appellant as the killer under the "excited utterance" exception to the rule against hearsay testimony.

KRS 421.210(1) provides:

> In all actions between husband and wife . . . either or both of them may testify as other witnesses, except as to confidential communications between them during marriage, . . . and provided further, that neither may be compelled to testify for or against the other.

In *Miller* v. *Carter*, Ky., 500 S. W. 2d 600 (1973), the Court reversed the lower court because the trial judge had compelled the husband to testify. "We have repeatedly stated that neither the husband nor the wife can be compelled to testify for or against the other, but the refusal to do so is the prerogative of the witness." *Supra*, at 600.

Margaret Cecil properly exercised that prerogative in asserting her immunity. Margaret was not married to appellant at the time of the shooting when she reported it to the police.

Lawson, in *Kentucky Evidence Law Handbook*, 8.60(B) (2d ed. 1984) states:

> A "spontaneous" statement is one uttered under the stress of nervous excitement and not after reflection or deliberation.

We have adopted Lawson's definition as the general rule for admitting proffered testimony as an excited utterance, including his list of eight criteria considered to be the most significant. *Souder* v. *Commonwealth*, Ky., 719 S. W. 2d 730 (1986).

The appellant seizes upon a few of these criteria to make the argument that the statements were not qualified to be admitted as excited utterances. We are not convinced, and believe that they were properly admitted under that exception.

Appellant hypothesizes that the time between the shooting and the first utterance could have been as long as 26

minutes. The amount of time between the act and the utterance is to be considered, we have no question about that. Appellant also states that because the utterances were in response to questions they fail to satisfy another criterion in Lawson's list. He also believes that two other criteria are not met, i.e., the place of the declaration, and the presence of visible results of the act.

We do not believe that the declarant was badgered into giving the answers she gave. Moreover, even if 26 minutes had elapsed, the deeply traumatic nature of a close range shotgun killing is hardly an event over which a person who witnessed it could regain her composure and reflect upon a fabricated answer in 26 minutes. Additionally, within these 26 minutes the declarant obviously was in the presence of the deceased because she reported the killing and said that the victim was not breathing anymore. These facts also make it obvious that "visible results of the act" were present, i.e., the body.

It must be borne in mind that *Souder* is not a strict true-false test for the admission of excited utterances, but provides guidelines for consideration. The passage of three minutes may be too long, so as to disqualify a statement as a spontaneous utterance. *Daws* v. *Commonwealth*, Ky., 234 S. W. 2d 953 (1950). However, much depends upon the nature of the act or occurrence causing the excitement. Considering the circumstances of this case, the passage of 26 minutes does not disqualify the statement as spontaneous. We believe the contested declarations were properly admitted.

Appellant's next argument is that the trial court erred by instructing the jury on the offense of wanton murder. He contends that there was no evidence to support the instruction. We disagree. Janie Benton testified that the appellant said he did not mean to shoot the victim, and the appellant himself stated that when he saw the victim stand-

ing beside the bed he simply lost control of himself and shot.

Appellant's next argument is that the trial court erred by refusing to allow medical records of the mental instability of a witness due to relevancy. We agree that the records were relevant, and therefore competent for admission in that respect. However, KRS 422.305 required defense counsel to give proper notice to the prosecution. This was not done, therefore, the trial court made the correct ruling, albeit for the wrong reason.

Appellant's next alleged error was the action of the trial court in permitting the videotaped deposition of a forensic pathologist to be introduced into evidence. The Commonwealth explained that the pathologist would be out of town, and thus unavailable to testify, at the time of trial. Appellant's counsel was present during the deposition and cross-examined the pathologist. Under the circumstances of this case, we fail to see any prejudice that appellant may have suffered by the admission into evidence of this videotape.

Appellant's final alleged error concerns the ruling of the trial court in permitting a detective to remain in the courtroom after appellant's objection. The detective was sitting at the prosecution table. Notwithstanding appellant's objection, the court permitted his testimony which was largely cumulative. RCr 9.48 gives a trial judge a modicum of discretion. We cannot say, under the circumstances, that the trial judge abused his discretion in permitting the detective to testify.

We affirm the judgment of the Jefferson Circuit Court.

All concur.

Attorney for Appellant:

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Mulhall, Turner and Hoffman
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Attorneys for Appellee:

Frederic J. Cowan
Attorney General

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Capitol Building
Frankfort, Ky. 40601-3494

APPENDIX B

SUPREME COURT OF KENTUCKY

89-SC-044-MR

CHARLES MICHAEL SMITH - - - - *Appellant*

v.

COMMONWEALTH OF KENTUCKY - - - *Appellee*

Appeal From Jefferson Circuit Court
Honorable Earl O'Bannon, Jr., Judge
No. 87-CR-1452

ORDER DENYING PETITION FOR REHEARING

Appellant's petition for rehearing is denied.

All concur.

ENTERED: May 24, 1990.

(s) Robert F. Stephens
Chief Justice

APPENDIX C

SUPREME COURT OF KENTUCKY

89-SC-44-MR

CHARLES MICHAEL SMITH - - - - *Appellant*

v.

COMMONWEALTH OF KENTUCKY - - - *Appellee*

On Appeal from Jefferson Circuit Court,
No. 87-CR-001452
(Hon. O'Bannon, Jr., Judge)

AMENDED ORDER

The order of this Court entered June 26, 1990, is amended to read as follows:

On motion of appellant Charles Michael Smith, a stay of execution and enforcement of this Court's opinion of March 15, 1990, which became final on May 24, 1990, is granted for a period of ninety (90) days to and including August 22, 1990, in order that Charles Michael Smith may make application to the Supreme Court of the United States for a Writ of Certiorari. Additional stays should be obtained from the United States Supreme Court.

ENTERED June 27, 1990.

(s) Robert F. Stephens
Chief Justice

APPENDIX D

JEFFERSON CIRCUIT COURT

FIFTH DIVISION

No. 87CR1452
87CR1842

COMMONWEALTH OF KENTUCKY - - - *Plaintiff*

v.

CHARLES MICHAEL SMITH - - - - *Defendant*

JUDGMENT
JURY VERDICT—PROBATION DENIED

On November 29, 1988, the Defendant appeared for sentencing following the jury verdict and judgment.

The Court has considered the presentence investigation report, the circumstances of the crime and the possibility of probation, and the Court finds that imprisonment is necessary because

(a) The Defendant is in need of correctional treatment that can be provided most effectively by his commitment to a correctional institution;

(b) A disposition of the Defendant by probation or conditional discharge will unduly depreciate the seriousness of the crime;

(c) And/or the Defendant is ineligible for probation.

The Defendant is 7/14/59 years of age. No further reason having been presented why sentence should not be pronounced;

IT IS ORDERED AND ADJUDGED that pursuant to the jury verdict that the Defendant is guilty of the crime of and is sentenced as follows:

87CR1452: CT. 1 — MURDER (WANTON) — THIRTY FIVE (35) YEARS;
CT. 2 — BURGLARY I — TEN (10) YEARS, CONCURRENT.

87CR1842: PFO II — DISMISSED.

TOTAL: THIRTY FIVE (35) YEARS.

IT IS FURTHER ORDERED that the Defendant be taken by the Sheriff of Jefferson County to be transferred to the custody of the Department of Corrections for execution of the sentence.

ENTERED IN COURT: November 30, 1988.

(s) Earl O'Bannon, Jr.
Earl O'Bannon, Jr., Judge

cc: Tom Wine
Commonwealth Attorney
Murray Turner
Attorney for Defendant

APPENDIX E

PORTION OF JURY TRIAL TRANSCRIPT
October 25, 1988

(Whereupon, transcript of the testimony of JANIE BENTON as requested by counsel.)

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Q. After Susie told you that Charlie might tell him?

A. Yes, I did tell him.

Q. I guess, you like him, too?

A. I don't have nothing against him, I don't like a lot of the things he does.

Q. Now, you claim that Charlie confessed this murder to you?

A. Yes, sir, he did.

Q. Is that right, and he told you that he did it out of jealousy?

A. He sure did.

Q. And that he shot him with a riffle?

A. That's right.

Q. And there's no question in your mind that that's what he said, I shot him with a riffle?

A. That's what he said.

Q. And, this was with his wife sitting right next to him?

A. That's right.

Mr. Turner: That's all the questions I have.

The Court: Is that it?

Questions by Mr. Wine:

Q. Mrs. Benton, how long ago was it that you

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told your husband about this affair, how long ago did that happen?

A. Oh, it's been a couple of years.

Q. Have you waited two years to get even with Charlie because he might have told your husband about that?

A. No, sir.

Q. You've also told the ladies and gentlemen of the jury that you think you've got a problem with alcohol?

A. I did have, I went to Our Lady of Peace for some help.

Q. Okay. And how long ago was that?

A. That was in '85.

Q. And have you been attending any type of self help groups since then?

A. No, not since then.

Mr. Wine: Thank you.

The Court: Any questions?

Questions Continued by Mr. Turner:

Q. You say that you have been in Our Lady of Peace Hospital?

A. Yes, sir.

Q. How many times have you been Our Lady of Peace the last couple of years?

A. I've been in there one time, back in

November I was there, the first of November.

Q. First of November, the last time you were in there, it's been within the last couple of years, right?

A. '87.

Q. Okay. November of '87?

A. November of '87.

Q. Okay. And that was since you say this affair thing when you thought Charlie was going to tell your husband about it, that was after that that you went into Our Lady of Peace, wasn't it?

A. And for personal problems, and I was having problems with my daughter.

Q. Okay. And weren't you suffering from a deep, intense anger at that time?

A. No, I wasn't.

Q. You weren't? And you had no desire to lash out at someone and hurt someone?

A. No.

Q. No desire—

A. I was in a state of depression and I went into Our Lady of Peace for some help.

Q. So, no desire to inflict injury on someone, kill them, even though you might have to die yourself?

A. No.

Q. And as far as you were concerned, you were suffering from no intense anger directed at anyone, especially Charlie Smith?

A. I had no anger towards him.

Mr. Turner: Okay, that's all the questions I have.

The Court: Is that it, Mr. Wine?

Okay, thank you, ma'am, you may step down.

(WHEREUPON, that concludes the transcribed testimony of Mrs. Janie Benton as requested by Mr. Malone.)

* * * * * * *

APPENDIX F

Our Lady of Peace Hospital, Inc.
2020 Newburg Road, Louisville, Kentucky 40232
502-451-3330

The copies of records for which this certification is made are true and complete reproductions of the original or microfilmed medical records of Janie M. Benton, Hospital #60724, consisting of 6* pages, which are housed in Our Lady of Peace Hospital. The original records were made in the regular course of business, and it was the regular course of Our Lady of Peace Hospital to make such records at or near the time of matter recorded. This certification is given pursuant to KRS 422.305 by the custodian of the records in lieu of his or her personal appearance.

*History, Physical, Discharge Summary only.

Date 10/24/88

(s) Judy Best
Custodian, Medical Records
Medical Record Department

Subscribed and sworn to before me this 24th day of October, 1988. My commission expires Oct. 27, 1992, Notary Public, State at Large, KY

OUR LADY OF PEACE HOSPITAL
Louisville, Kentucky

Name: Benton, Janie H.
Doctor: John J. Casey
Dictated: 12/27/87
Transcribed: 12/30/87

MR #: 60724
Admitted: 11/01/87
Discharged: 11/28/87

This is a 38 year old married female admitted to this hospital on the 1st of November, 1987 and discharged on the 28th of November, 1987. At the time of admission the patient was extremely distraught, upset, tearful and suicidal. She has been living in a very difficult neighborhood for the past several months and she has also been troubled a great deal by a daughter who is dating and plans to marry a member of another race. The neighborhood is full of drugs, alcohol, partying and she feels very threatened by this environment. The patient has become extremely upset by this, feels tearful, angry, depressed and fearful. She has not been able to eat nor sleep and has thoughts about wanting to obtain a gun with the idea of possibly killing someone else or herself. The patient herself denies any alcohol or drug use. The situation has been progressive to the point where the patient fears she is no longer in control. She has been crying all the time but so far has had no delusions or hallucinations. The patient's own childhood has a great deal to do with the present situation as she herself grew up in an environment where alcohol, drugs and sexual molestation were prevalent and the patient herself was a victim. The patient feels very inferior, rejected, worthless, put down, unloved and has extreme depressed feelings as well as anger.

PHYSICAL EXAMINATION: Reveals a benign cyst removed from her right breast in the past, a tubal ligation in 1975. She is allergic to Codeine and aspirin and she smokes

approximately 2 packs of cigarettes per day. Blood pressure is 100/70, the vital signs are within normal limits. Weight is 150 pounds. The general physical examination was within normal limits with the exception of tinea versicolor over large areas of her back.

LABORATORY DATA: Reveals an elevated cholesterol of 280 otherwise the MCP is within normal limits. Her CBC reveals 16.8 grams or hemoglobin, the differential is normal. The urinalysis revealed 3+ bacteria and a specific gravity of 1030. The drug screen revealed nicotine, diazepam and amitriptyline and no cannabinoids were present. The thyroid profile was within normal limits.

COURSE IN THE HOSPITAL: The patient was admitted and placed in Xanax .5 mg. q. 4 h. prn and Elavil 50 mg. hs. She was seen daily in psychotherapy. She was asked to attend the assertiveness and stress management classes as well as the Adult Children of Alcoholics. She was also asked to read "*Born to Win*". The Elavil was increased to 100 mg. every night. The patient was able in psychotherapy to share many of the feelings that she had during her childhood which were very painful and very tearful. She was also able to share much of how she felt towards her daughter and also many of the feelings that she has towards her sister, her foster mother and other members of her family. The Elavil was increased to 150 mg. at bedtime and she was also started on Trilafon Concentrate 4 mg. gid. The suicidal precautions were discontinued on the 6th of November and the Trilafon was then changed to Stelazine 5 mg. tid. Gradually the patient became more active and began to deal with her feelings in psychotherapy and seemed to gain some from her classes and from the book that she was reading. Gradually her affect began to improve but she continued to have periods of feeling extremely nervous, crying spells and anxiety and worry over

her daughter. On the 16th of November the patient was asked to attend the educational classes for alcoholism and also the Alanon sessions and she was asked to discontinue the use of caffeine substances. The patient apparently has been in the habit of drinking three or more of the 2 liter bottles of caffeine soft drinks as well as coffee and other caffeine containing substances. She willingly agreed to do this. On the 17th of November the Elavil was reduced to 100 mg. at bedtime and the Stelazine was reduced to 5 mg. at hs. She continued to gain some insight and feel somewhat better. She was also able to read *"The Angry Book"* and was allowed out over the weekend of the 22nd. This was not a very good weekend as she was extremely upset with her daughter and yet was unable to really effectively deal with these feelings. She continued to be very tearful, withdrawn, angry after the weekend and this was dealt with again in psychotherapy. The Elavil was increased. The patient was able to really explode and to release a lot of the feelings that she had and felt much better afterwards. She had a good visit with her family over Thanksgiving and felt that she was then willing and able to return home. She was therefore discharged on the 28th of November on Stelazine 5 mg. at hs, Amitriptyline 100 mg. at hs and Xanax .5 mg. prn. She was returned home and felt that she had the support of her husband and that they did make plans to move from the neighborhood in a few months.

DIAGNOSIS: Major depression, recurrent.
Tinea versicolor.

PROGNOSIS: Is considered guarded.

(s) John J. Casey
John J. Casey, M.D.

JJC:nsg

DISCHARGE SUMMARY
OUR LADY OF PEACE HOSPITAL
Louisville, Kentucky

Name: Benton, Janie H. MR #: 60724
Dictated: 11/16/87 Admitted: 11/01/87
Transcribed: 11/16/87 Doctor: John J. Casey

This is a 38 year old, married female admitted to this hospital on the 1st of November 1987, per Dr. John Urton who was covering for me. At the time of admission, the patient was extremely distraught, upset, tearful, and suicidal. They apparently had moved into a different apartment in a different neighborhood this past fall, and she is now living in a neighborhood that is full of drugs, alcohol, partying and she feels very threatened by this environment. In addition, she has also had difficulty with her daughter and with her sisters and immediate family. Her daughter has been acting out, has been dating a member of another race and generally has been disruptive to the patient's way of life. She has become extremely upset by this, feels very tearful, very angry and very depressed. She has not been able to eat, has not been able to sleep and has had thoughts about wanting to obtain a gun with the idea of possibly killing someone else and possibly killing herself. She denies any alcohol or drug use at the present time. The ongoing situation has become progressively more intense to the point where the patient really feels tremendous urges that were very difficult to resist. She was crying most all of the time but did not have delusions or hallucinations. The patient's own past history has been brought acutely to the forefront as the patient grew up in a very disruptive environment. Alcohol and drugs were quite prevalent and the patient also was molested by foster parents. This has intensified the present situation.

PAST HISTORY & FAMILY HISTORY: The patient was previously here approximately two years ago when she was treated for alcoholism, overdose of Valium and a major depression but the patient states that she has done quite well for the past two years avoiding alcohol and drug use.

MENTAL STATUS: Reveals that the patient is oriented to time, place and person. There are no delusions or hallucinations. Patient is extremely tearful, depressed in her affect and underlying deep intense anger where she would like to lash out and hurt others and feels that she, herself, would probably have to die afterwards. She has been made to feel inferior, rejected, worthless, put down and unloved. At the present time, she resents where she lives and the people around her, the pressures upon her and the way her own daughters and members of her family are living. Her insight and judgment are considered fair.

TENTATIVE DIAGNOSIS: Major depression, recurrent.

FORMULATION & PLAN OF TREATMENT: Patient grew up in a very disruptive, dysfunctional environment and spent part of her life in foster homes where she was molested and her own family were victims of alcoholism and her brothers and sisters also are alcoholics at the present time and into the use of drugs. The patient had a very unhappy first marriage which only lasted three or four years. The second marriage has been approximately 14 years and seems to be much more healthy and supportive and the patient has always wanted to have a much better way of life. However, recently they moved into a neighborhood that is very reminiscent of her childhood with partying, drug usage, alcohol, quite openly, with a great deal of peer pressure upon the patient and her husband and her family to participate. She has become extremely depressed over this. In addition, her daughter has acted

out with alcohol and dating a member of another race and this has been extremely distasteful and resentful by the patient. The plan of treatment is to institute the tricyclic antidepressants and antipsychotic medications in order to help her to reintegrate her feelings and for her to again get in touch with the awareness of alcoholism and drug usage and to begin to gain in her own self-respect and self-image. She will be asked to attend the stress management and assertiveness classes and also Al-Anon and adult children of alcoholics. She will be asked to read various books and we will help her to obtain some insight into her difficulties.

(s) John J. Casey
John J. Casey, M.D.

JJC/bss

CASE HISTORY OUTLINE
OUR LADY OF PEACE HOSPITAL
Louisville, Kentucky

Name: Benton, Janie M. MR #: 60724
Dictated: 11/01/87 Admitted: 11/01/87
Transcribed: 11/2/87 Doctor: William Aufox for John W. Urton

REASON FOR ADMISSION: This is a 38 year old white female who comes in stating she is depressed.

PAST MEDICAL HISTORY: Patient had a benign cyst removed from her right breast. Patient had a tubal ligation about 1975. Patient states she is allergic to codeine and aspirin which causes GI upset. Patient presently is using Valium in 5 to 10 mg. amounts, up to ten tablets a day for the past two months. Patient also states she is smoking approximately 2 packs of cigarettes a day.
GENERAL: Middle aged white female appearing quite listless but cooperative with exam.

BLOOD PRESSURE: 100/70

PULSE: 76.

RESPIRATIONS: 18.

HEENT: Normocephalic. Pupils are equal, round and reactive to light and accommodate. Fundi benign O.U. TM's clear bilaterally. Posterior pharynx benign. Teeth in good repair.

NECK: Supple without any cervical adenopathy or thyromegaly.

LUNGS: Clear with a dry high pitched non-productive cough with deep inspiration.

HEART: Regular rate and rhythm with normal S1 and S2. No murmurs or gallops noted.

ABDOMEN: Soft, non-tender without any hepatosplenomegaly or masses noted.

EXTREMITIES: Without cyanosis, clubbing or edema

SKIN: Multiple areas of 1-3 cm patches or hypo-pigmented skin noted on her back and right shoulder.

NEUROLOGICAL: Cranial nerves II-XII grossly intact. No gross motor or sensory deficit. DTR's are 2+ and symmetrical. Patient's gait is normal. Speech and language are intact.
Benton, Janie M.

IMPRESSION:

1. Tobacco abuse.
2. Tinea versicolor.
3. Psych diagnosis deferred.

(s) W. Aufox
William Aufox, M.D.

WA/wd

PHYSICAL EXAMINATION

APPENDIX G

This is a master tape of the Jefferson County Police Department. The time is 2:41. The date is 9/22/87. The tape is by Supervisor Mitchell.

Police: County Police Elmore

Cecil: Yes, please send a police officer to 307-7-7 Huntington Park Dri-ive.

Police: What's the problem?

Cecil: There's been a shooting. Please, please hurry.

Police: Who's, Who's been shot?

Cecil: Oh God, his name is Mike Foley and

Police: Where's he at? Is he there now?

Cecil: Yes, he is and he

Police: Who shot him?

Cecil: (crying hysterically)

Police: Hold on, Hold on. Who shot him?

Cecil: Uh, a Charles Michael Smith.

Police: Is he still there?

Cecil: No, he's gone. Oh, please

Police: 307 Huntington Park, is that a house or an apartment?

Cecil: It's an apartment complex.

Police: Is that the apartment number also?

Cecil: Yes. Please

Police: What's your name?

Cecil: My name is Margaret Cecil.

Police: Okay, is the person that did the shooting already gone?

Cecil: Yes, he he broke in. Ple-e-ease . . .

Police: How bad is this shooting?

Cecil: I can hear him breathing any more. Please hurry up.

Police: Okay, I'll have officers on the way.

Cecil: Thank you.

Police: Okay.

(phone ringing, police calling back)

Cecil: Hello-o.

Police: Ms. Cecil?

Cecil: Yes.

Police: This is county police. Calm down a minute. Tell me what this man's name was that did the shooting again.

Cecil: His name is Charles Michael Smith.

Police: Charles Michael Smith?

Cecil: Yes.

Police: Which way did he go?

Cecil: I honestly to God do not know.

Police: You don't know?

Cecil: No, I just know he lives on Burnett.

Police: He lives on Burnett?

Cecil: Yes, he was a former boyfriend and he (crying)

Police: Okay. Is he a white male?

Cecil: Yes he is.

Police: Yes. Okay and you don't know which way he went?

Cecil: No maam, I do not.

Police: And how's the guy there?

Cecil: Oh God, he is bleeding so bad.

Police: Where's he shot at?

Cecil: I don't know, I can't get him to, I can't move him.

Police: Did, was was this guy inside or was he outside or what?

Cecil: He broke into my apartment, he broke the fucking door down.

Police: He broke the door down and came in and shot this guy?

Cecil: Ye-es.

APPENDIX H

JEFFERSON CIRCUIT COURT

FIFTH DIVISION

No. 87CR-1452

COMMONWEALTH OF KENTUCKY - - - *Plaintiff*

v.

CHARLES MICHAEL SMITH - - - - *Defendant*

AVOWAL EVIDENCE FOR HEARING 8/4/88

Tape transcription of phone call to G. Murray Turner by Margaret S. Cecil on January 26, 1988.

GMT: Hello.

MJC: Hello.

GMT: Yes, this is Murray Turner, who am I speaking with please?

MJC: Margaret Cecil.

GMT: Margaret I have a tape recorder on and with your permission I am going to record our conversation, is that agreeable with you?

MJC: Yes.

GMT: Now, you are aware that I am recording this conversation and you are agreeable to that?

MJC: Right.

GMT: I understand that you are agreeable to giving me a statement about the shooting that occurred on September the 22nd, is that correct?

MJC: That's right.

GMT: Now, this statement that this statement that you are giving me, is this statement being given freely and voluntarily without any threat or cohersion?

MJC: Right.

GMT: Well, just for the record would you state me your full name.

MJC: Margaret Lee Cecil.

GMT: and you have a nickname also is that correct?

MJC: Yes, it's Susie.

GMT: Susie.

GMT: Just for purposes of identification Susie can you tell me your date of birth?

MJC: eleventh month, the eleventh day of 46.

GMT: And you social security number.

MJC: 403-66-4502

GMT: I understand that on September the 22nd 1987 that you were a witness to a shooting, is that correct?

MJC: That's right.

GMT: Can you tell me where that shooting took place?

MJC: In the bedroom.

GMT: Could you be a little more specific, like the address?

MJC: 307 Huntington Park Drive.

GMT: Is that in Louisville, Jefferson County, Kentucky.

MJC: Yes it is.

GMT: And could you tell me the name of the individual who was shot.

MJC: Michael Foley.

GMT: Now, if I could I would like to ask you some specific questions about what took place that evening?

MJC: Ok.

GMT: Now, can you tell me what time of night it was when the shooting took place?

MJC: I'm not sure around maybe 2:30 I don't know about 2:30, 2:40 something like that maybe.

GMT: In that area?

MJC: Yes.

GMT: Where were you at the time the shooting took place?

MJC: In the bedroom.

GMT: And is this your apartment?

MJC: Yes it is.

GMT: Before the shooting took place had you been asleep?

MJC: No.

GMT: You were awake at the time these events took place?

JMC: Right.

GMT: Can you tell me in the bedroom if the lights were off or on?

MJC: They were off.

GMT: Were all the lights in you apartment off or just the lights in the bedroom?

MJC: No, the dining room light was on.

GMT: Were the rest of light in the apartment?

MJC: They were off.

GMT: So the only light on in the apartment is the light in the dining room?

MJC: Right.

GMT: Now, just so I can understand exactly what happened you say you were awake at the time the events took place is the correct?

MJC: That's right.

GMT: Now . . .

MJC: I was awake because I had just gotten off of the phone.

GMT: At the time the shooting had taken place you had just gotten off of the telephone?

MJC: Right.

GMT: Can you tell me who you were talking to on the telephone?

MJC: I was talking to my sister she had called me and said Charlie was down at her bar and that he seemed to be very upset and that she did not know whether he was coming to see me or not but I had better go move my car. She was afraid he might destroy my car.

GMT: Ok, how long was it, can you tell me in terms of minutes or seconds or how much time had expired from the time you got off the phone with your sister until this shooting took place?

MJC: Maybe a minute, wasn't very long and he was at the door, I know it couldn't have been more than a minute. The door bell was ringing and I wouldn't answer it and I thought whoever was there would go away and they didn't. They were in.

GMT: From the time you hung up the phone with you sister til the door bell ring, can you tell me the length of time that was involved?

MJC: Not more than a minute.

GMT: Had you had time to do anything from the time you hung up the phone til the door bell rang?

MJC: No.

GMT: So really you were just standing in the same position where you had just hung up the phone?

MJC: Right.

GMT: And you had done anything from the time you hung up the phone till the door bell rang?

MJC: Right.

GMT: Now, as the individual who did the shooting came into the bedroom, did you see him when he came in?

MJC: No. Not clearly.

GMT: Would he have gone through the dining room area as he came into the bedroom?

MJC: Right.

GMT: Did you see him while he was in the bedroom?

MJC: The part of the bedroom I was in, it was dark.

GMT: And you never saw this individual before he got into the bedroom?

MJC: No.

GMT: Okay, and then how long was the individual who did the shooting, how long was he in the bedroom?

GMT: Was it, so it was a very short period of time.

MJC: Right.

GMT: Did you ever see that individual's face?

MJC: No.

GMT: And then the individual . . . . .

MJC: Where I was standing, all I could see was a side-view.

GMT: Was it dark in the bedroom so that you could not make out the facial features clearly?

MJC: Right.

GMT: And then this individual turned and left.

MJC: Right.

GMT: Did you watch him as he left or did you go attend to the individual who had been shot?

MJC: I went to the individual who was shot.

GMT: So you never saw the individual as he went back out into the lighted area through the dining room?

MJC: No, I did not.

GMT: So other than a very brief glimpse of the individual in the dark, that is the only time you saw that individual?

MJC: That's right.

GMT: Now, I understand that you gave a statement to the police that Charles Michael Smith did the shooting.

MJC: Right.

GMT: Did you give them a statement to that effect?

MJC: Yes. I assumed it was him because my sister had called me.

GMT: But the statement was based on that assumption, not based on what you saw inside the apartment.

MJC: Right.

GMT: Is that correct?

MJC: That's right.

GMT: Well, do you know of anyone else who might of done the shooting or would have had a motive to do the shooting?

MJC: No, I do not.

GMT: The individual who was shout, Michael Foley, do you know anything about his friends or enemies?

MJC: No, I do not.

GMT: Do you know who else he might know here in Jefferson County?

MJC: No, I do not.

GMT: You do know that he was married?

MJC: Yes, I did.

GMT: Do you know whether or not any of his family or any other of the individuals that he knew, were aware that he was running around on his wife?

MJC: No, not to my knowledge.

GMT: So you don't really know from his, the people that he knew, who might had a motive to shoot him?

MJC: No.

GMT: Do you know where your sister was when she called you?

MJC: She was at work.

GMT: Where does she work?

MJC: She works at the Warehouse Pub.

GMT: Where is that located?

MJC: It is over on 7th Street.

GMT: And where is your apartment located that is on Huntington Park?

MJC: Poplar Level Road

GMT: Have you had, an occasion to drive from where your sister works on 7th Street Road to where your apartment is?

GMT: Can you tell me approximately how long it would take you to drive that distance.

MJC: I would say at least 15 to 20 minutes.

GMT: Well, at least that length of time?

MJC: At least.

GMT: From the time, would someone, Well, do you think someone would have had the time to drive from your apartment to the warehouse or from the warehouse there to your apartment from the time you talked to your sister until the individual rang the door bell?

MJC: No I do not.

MJC: Because it was just to fast after I hung up off the phone.

GMT: In fact would you say a minute or less?

MJC: Yes, a minute or less.

GMT: Let me see if there is anything else I need to ask you. Is there anything else that you can tell me about this shooting that you know anything about?

MJC: No.

GMT: Again, was the statement to the police that Charles Michael Smith did the shooting based on an assumption of yours that because of the phone call you had received from you sister and the fact that you don't know of anyone else who would have done something like this?

MJC: Right.

GMT: But you could not see the face or identify the person you saw as Charles Michael Smith?

MJC: No.

GMT: Ok, is there anything else you can think of to tell me about this that would help clear it up or shed some light on it in any way.

MJC: No, I can't think of anything else.

GMT: OK, Ms. Cecil thank you very much for calling me and I appreciate you giving me your statement on this matter.

MJC: Ok.

GMT: Thank you very much.

MJC: Bye.

GMT: Bye.

GMT: This is Murray Turner and I have just completed a phone call with Margaret Cecil.

APPENDIX I

No. 87CR1452

JEFFERSON CIRCUIT COURT

DIVISION FIVE

COMMONWEALTH OF KENTUCKY - - - *Plaintiff*

v.

CHARLES MICHAEL SMITH - - - - *Defendant*

INSTRUCTIONS

Under the evidence presented to you in this case, you may find the defendant, Charles Michael Smith, not guilty or you may find him guilty of the following offenses:

(a) Murder, as set out in Instruction No. I(a) or (b);

OR

(b) Manslaughter in the First Degree, as set out in Instruction No. II;

OR

(c) Manslaughter in the Second Degree, as set out in Instruction No. III:

AND/OR

(d) Burglary in the First Degree, as set out in Instruction No. IV;

No. I(a)—MURDER (Intentional)

You will find the defendant, Charles Michael Smith guilty under this Instruction if, and only if, you believe from the evidence beyond a reasonable doubt all of the following:

(a) That in this county on or about September 22, 1987, and before the finding of the indictment herein, he killed Michael Foley by shooting him with a 410 gauge shotgun;

AND

(b) That in so doing, he caused Michael Foley's death intentionally and not while acting under the influence of extreme emotional disturbance for which there was a reasonable justification or excuse under the circumstances as he believed them to be.

If you find the defendant guilty under this instruction, you shall say so by your verdict and no more.

No. I(b)—MURDER (Wanton)

You will find the defendant guilty under this Instruction if, and only if, you believe from the evidence beyond a reasonable doubt all of the following:

(a) That in this county on or about September 22, 1987, and before the finding of the indictment herein, he killed Michael Foley by shooting him with a 410 gauge shotgun;

AND

(b) That in so doing, he was wantonly engaging in conduct which created a grave risk of death to another and thereby caused Michael Foley's death under circumstances manifesting an extreme indifference to human life;

If you find the defendant guilty under this instruction, you shall say so by your verdict and no more.